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**Citation for published version:**

Kelly, M 2017, 'Mixed-up wills, rectification and interpretation: Marley v. Rawlings', *Statute Law Review*, vol. 38, no. 3, pp. 265-285. <https://doi.org/10.1093/slr/hmx011>

**Digital Object Identifier (DOI):**

[10.1093/slr/hmx011](https://doi.org/10.1093/slr/hmx011)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

Statute Law Review

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Full title:

Mixed-up Wills, Rectification and Interpretation: *Marley v Rawlings*

Running title:

Mixed-up Wills, Rectification and Interpretation

Author

Martin David Kelly

Contact:

Correspondence:

School of Law, Old College, Edinburgh EH8 9YL

Email:

[martindkelly9@gmail.com](mailto:martindkelly9@gmail.com)

Word count:

7,847 (excluding footnotes, title page and abstract)

Name and acknowledgements footnote:

Martin David Kelly\*

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\* PhD Candidate & Tutor, School of Law, University of Edinburgh EH8 9YL (email: [martin.kelly@ed.ac.uk](mailto:martin.kelly@ed.ac.uk)). I'm grateful to Luis Duarte d'Almeida, David Levy, Euan MacDonald, and the participants in the Work-in-Progress session of the Edinburgh Legal Theory Research Group (held on 4 March 2016) for their helpful comments on earlier drafts of this paper.

## **Mixed-up Wills, Rectification and Interpretation: *Marley v Rawlings***

### **Abstract**

In *Marley v Rawlings*, the UK Supreme Court had to decide who should inherit the estate of Alfred Rawlings — who had mistakenly signed his wife's Will (instead of his own). In this article, I will examine the issues of interpretative methodology arising from this case. The Supreme Court resolved the dispute by exercising its statutory power to rectify the 'Will'; but it failed to articulate clearly its interpretative methodology and failed to give sufficient reasons for its interpretative conclusions. I will argue that its reasoning is best understood as primarily consequentialist.

The Supreme Court also commented on the proper approach to interpreting Wills — and addressed criticisms of Lord Hoffmann's influential approach to contractual interpretation. I will argue that the Supreme Court's claim that all non-legislative legal documents should be interpreted using the same method is potentially misleading; and that its justification for restricting the courts' ability to correct mistakes by interpretation — that it invades the territory of rectification — is misdirected. For, whilst 'corrective' interpretations may endanger legitimate third party expectations, those expectations are better protected by limiting the context information that is admissible in the interpretative process than by limiting the amount of 'red ink' that may be used in correcting a document through interpretation.

## 1. Introduction

The Supreme Court decision in *Marley v Rawlings* addressed how the courts should approach the interpretation of statutory provisions and of non-legislative legal documents (in this case, a Will).<sup>1</sup> In this article, I will seek to identify the interpretative methodologies used in this case and to evaluate the courts' application of those methodologies to the (rather unusual) facts of the case.

In Parts 2, 3 & 4, respectively, I will outline the facts of the case; the legal issues that it raised; and the conclusions that the courts reached on those issues. Part 5 analyses the courts' reasoning on the issues of statutory interpretation in the case. I will argue that the Supreme Court failed to be clear about its interpretative methodology or adequately to justify its conclusions; and failed properly to engage with the reasons that led the Court of Appeal to the opposite conclusions.

Part 6 addresses the interpretation of the Will itself and to the Supreme Court's tantalisingly brief comments on the interpretation of non-legislative legal documents (such as contracts and Wills). I will argue that, whilst the Supreme Court was correct to view this as a promising line of argument in the case, its assimilation of the approach to interpreting Wills to that of interpreting contracts unhelpfully obscures important differences in these types of legal instrument. Part 6 also examines the Supreme Court's engagement with criticisms of Lord Hoffmann's judgment in *Chartbrook* on the relationship between interpretation and rectification.<sup>2</sup> I will argue that the value of limiting the courts' ability to correct mistakes by interpretation, and thereby carving out a distinct space for rectification, is that this may protect legitimate third party expectations. But such expectations rarely, if ever, arise in the case of Wills; and, where they do, what may jeopardise those expectations is not the extent of the requisite corrections but rather the admissibility of contextual information that was not reasonably available to those third parties.

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<sup>1</sup> *Marley v Rawlings* [2014] UKSC 2. In this article, I capitalise the word "Will" to refer to the type of legal document, to distinguish it from other uses of the word, except in direct quotations.

<sup>2</sup> *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

## **2. Facts and legal context**

In May 1999, Alfred & Maureen Rawlings were visited by their solicitor to execute the Wills which he'd drafted on their instructions. The documents were brief and largely identical: each left the entire estate to the survivor of them; and otherwise to their 'adoptive son', Mr. Marley.<sup>3</sup> However, the solicitor mistakenly gave each of them the other's draft Will to sign — and they didn't notice this mix-up. So Alfred signed Maureen's draft Will; and Maureen signed Alfred's draft Will. The solicitor and his secretary attested the signatures and dated the documents.

When Maureen Rawlings died in 2003 no-one spotted the mistake and her estate passed to Alfred.<sup>4</sup> But the error was discovered when Alfred died in 2006. Mr. Marley, the intended beneficiary, applied to the High Court for rectification of Alfred's putative Will — and for probate of that Will (as so rectified). The Rawlings' two estranged sons, Terry & Michael Rawlings, challenged that application. If Alfred's 'Will' was effective (or could be made so by rectification) then Mr. Marley would inherit the estate under its terms; but if it was (and remained) ineffective then Alfred Rawlings had died intestate and his biological sons would inherit the estate between them.<sup>5</sup>

## **3. The Legal Issues**

The arguments in the case focused mainly on the interpretation of the court's statutory power to rectify a Will under section 20 of the Administration of Justice Act 1982 ("AJA 1982"):

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<sup>3</sup> Terry Marley was not biologically related to Alfred or Maureen Rawlings; but they'd raised him as their son and he'd cared for them both in their infirmity.

<sup>4</sup> Although it is not clear from the case reports there seems to have been no move to revisit the distribution of Maureen Rawlings' estate (perhaps because, even on intestacy, her assets would have passed wholly to Alfred).

<sup>5</sup> Alfred Rawlings' interest in the house that he lived in with Mr. Marley passed directly (i.e. not via the Will) to Mr. Marley under the doctrine of survivorship — so Mr. Marley would not have been entirely disinherited.

“(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence -

(a) of a clerical error; ...

it may order that the will shall be rectified so as to carry out his intentions.”<sup>6</sup>

This raised three issues of statutory interpretation. The court only had power to rectify the document signed by Alfred Rawlings if it was “a will” for the purposes of section 20 AJA 1982. Clearly, it was “a will” if it satisfied the validity conditions in section 9 of the Wills Act 1837 (“WA 1837”):

“No will shall be valid unless –

(a) it is in writing, and signed by the testator...; and

(b) it appears that the testator intended by his signature to give effect to the will; and...”<sup>7</sup>

So the first issue was whether the document was a valid Will. The second issue was: could it be “a will” even if these validity conditions were not satisfied i.e. does “a will”, as used in section 20 AJA 1982, include invalid —‘Pickwickian’ — Wills.<sup>8</sup> And, thirdly, if the document signed by Alfred was “a will” for the purposes of section 20 (either because it was a valid Will or because section 20 includes Pickwickian Wills) then was it “so expressed” that it failed to carry out Alfred’s intentions in consequence of a “clerical error”?

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<sup>6</sup> There was no question of a failure to understand the testator's instructions (section 20(1)(b) AJA 1982).

<sup>7</sup> This wording was introduced by section 17 AJA 1982 — which replaced the previous wording of section 9 WA 1837 — i.e. it was enacted along with the new statutory power of rectification in section 20 AJA 1982.

<sup>8</sup> I borrow this term from Lon Fuller, *The Morality of Law* (1964) Yale, 39: “...a total failure...does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.”

A fourth, non-statutory, interpretative issue was raised only at the Supreme Court stage: was the ‘Will’ effective purely as a matter of interpreting it (i.e. without needing to rectify it).<sup>9</sup> This fourth issue will be addressed in Part 6 of this article.

#### 4. The Decisions

In the High Court, Proudman J. regretfully dismissed Mr. Marley's application.<sup>10</sup> She held that the document signed by Alfred Rawlings was not “a will” (under section 20 AJA 1982) as it did not satisfy the validity condition in section 9(b) WA 1837.<sup>11</sup> Moreover, even if it was a valid Will, it was not open to the court to rectify it — because it was not “...so expressed that it fails to carry out the testator's intentions, in consequence...of a clerical error”. The error may well have been “clerical” but, in Proudman J.’s view, it involved a failure of *execution* not one of ‘expression’.<sup>12</sup>

The Court of Appeal unanimously upheld the High Court’s decision.<sup>13</sup> Lady Justice Black, giving the leading judgment, reasoned that the word “will” in section 20 AJA 1982, understood in its statutory context, included only formally valid Wills.<sup>14</sup> The document signed by Alfred Rawlings was not, however, a formally valid Will: Black L.J. doubted whether it satisfied section 9(a) WA 1837 but held that, even if it did, it failed to satisfy section 9(b).<sup>15</sup> As this was sufficient to

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<sup>9</sup> The courts also addressed an argument that the document could be made effective through exercise of the common law power to delete words from a Will if they do not reflect the testator’s intentions. The courts were unimpressed by this argument and, as it is not an interpretative issue, I will not address it further here.

<sup>10</sup> *Marley v Rawlings* [2011] EWHC 161 (Ch).

<sup>11</sup> *Ibid.*, [21]. Proudman J. assumed, implicitly, that a document could only be a “will” for the purposes of section 20 AJA 1982 if it was a formally valid Will under section 9 WA 1837 — a proposition that the Court of Appeal explicitly argued for and that the Supreme Court ultimately rejected (see Part 4.2 below).

<sup>12</sup> *Ibid.*, [28]—[30].

<sup>13</sup> *Marley v Rawlings* [2012] EWCA Civ 61.

<sup>14</sup> *Ibid.*, [39]—[44].

<sup>15</sup> *Ibid.*, [46]—[54].

determine the appeal, the proper interpretation of “so expressed...in consequence...of a clerical error” did not strictly arise — and Black L.J. preferred not to express a view on it.<sup>16</sup>

The Supreme Court unanimously allowed Mr Marley’s appeal — holding that it was empowered to, and should, order rectification of the document.<sup>17</sup> Lord Neuberger PSC, with whom all the other justices agreed, differed from both the High Court and the Court of Appeal on all three issues of statutory interpretation. The Supreme Court also discussed the ‘new’ argument — on the interpretation of the document itself — although it declined to reach a concluded view on it.

Part 5 below addresses the three issues of statutory interpretation in turn; the evaluation of the Supreme Court’s remarks on the interpretation of the ‘Will’ is in Part 6.

## **5. Statutory Interpretation**

The five Supreme Court Justices interpreted the two Acts very differently from the previous four judges. I will analyse what justifications they offered for their interpretative conclusions — and the extent to which those conclusion result from adopting a different interpretative methodology.

### **5.1 Was the document signed by Alfred Rawlings a valid Will?**

The Court of Appeal had agreed with the High Court that the document was not a valid Will; but Black L.J. provided more details reasons than Proudman J.<sup>18</sup> Black L.J. first considered the purpose of section 9 WA 1837. She argued, by tracing its history through various amendments, that a key purpose of its requiring a signature is that, by signing it, the testator is “confirming that the

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<sup>16</sup> *Ibid.*, [94]. Sir John Thomas P. (concurring) inclined towards giving the section a wide scope: *Ibid.*, [108].

<sup>17</sup> *Marley v Rawlings* [2014] UKSC 2.

<sup>18</sup> Proudman J. merely referred to two (non-binding) court decisions and then asserted that if Alfred had been asked ‘Did you intend by your signature to give effect to the will which you signed?’ he would “simply have responded, ‘no, of course not, that is my wife’s will’.” *Marley v Rawlings* [2011] EWHC 161 (Ch), [19]-[21].



document represents his testamentary intentions”.<sup>19</sup> The objective of the signing requirement was therefore to provide a “simple and reliable way of establishing” that the testator “knew and approved the contents” of the written document that bore his signature.<sup>20</sup> Black L.J. then emphasised two aspects of the wording of section 9(b) WA 1837:

“No will shall be valid unless—... (b) **it appears that** the testator intended by his signature to give effect to **the will**” (emphasis added)

First, Black L.J. argued that, whilst Alfred Rawlings clearly intended by his signature to give effect to *a* Will (i.e. his own), he did not intend his signature to give effect to *the* Will (i.e. his wife’s).<sup>21</sup> The phrase “the will” in section 9(b):

“must...mean the will which is in writing before the would-be testator, the one Mr Rawlings actually signed. That is the will to which the testator must have intended to give effect and he did not so intend.”

Secondly, Black L.J. argued that the opening words of section 9(b) (“it appears that”), understood in their historical context, indicate that validity depends on “what is apparent from the face of the document” and not solely on the testator’s subjective intention.<sup>22</sup> But a person reading the document signed by Alfred Rawlings — without knowing the circumstances — would be in some doubt as to whether his signature was intended to give effect to it. So Black L.J.’s analysis of the language of

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<sup>19</sup> *Marley v Rawlings* [2014] UKSC 2, [51].

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, [52]—[53].

<sup>22</sup> *Ibid.*, [54].

section 9(b) complements her characterisation of the purpose of the signature requirement; purposive and linguistic approaches both pointed to the same conclusion: invalidity.

The Supreme Court disagreed. Lord Neuberger asserted, first, that section 9 WA 1837 is concerned with formalities; and whether a document “does not make sense, at least if taken at face value” is an issue of construction (i.e. substance) rather than one of validity (i.e. form).<sup>23</sup> So it is possible that a Will could be valid but wholly ineffective. Lord Neuberger then asserted that:

“There can be no doubt...from the face of the Will (as well as from the evidence) that it was Mr Rawlings's intention at the time he signed the Will that it should have effect”<sup>24</sup>

This, the Supreme Court held, was sufficient for the document to satisfy section 9(b).

Unfortunately, neither the content of the Supreme Court’s argument nor the interpretative method(s) that it used in arriving at this contrary conclusion are clear from these passages. It seems reasonable to infer that Lord Neuberger interpreted the phrase “the will” in section 9(b) differently from Black L.J.; otherwise it’d be odd to assert that there “can be no doubt” about the truth of a proposition that three Court of Appeal judges rejected as false. The Supreme Court seems to have understood “the will” as meaning ‘the document, whatever its contents’; whereas the Court of Appeal read it as ‘the document, with the contents that it actually had’.<sup>25</sup> So Lord Neuberger appears implicitly to have disagreed with Black L.J.’s characterisation of the purpose of section 9(b) as well as her linguistic analysis of it. However, whilst he set out his alternative take on its purpose, Lord Neuberger did not engage with Black L.J.’s linguistic arguments at all. This is disappointing; for, whilst linguistic meaning is not necessarily determinative of legal meaning, we would usually

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<sup>23</sup> *Ibid.*, [58].

<sup>24</sup> *Ibid.*, [59].

<sup>25</sup> This seems particularly odd given that, earlier in his judgment, Lord Neuberger endorsed the earlier Court of Appeal decision (*Fuller v Strum* [2002] 1 WLR 1097) on which Black L.J.’s reasoning relied (*Ibid.*, [16]).

expect there to be a close relation between the two — and that a court would not apply a statutory provision contrary to its linguistic meaning unless there is a good reason to do so.<sup>26</sup>

Even if the Supreme Court was right that section 9(b) is concerned only with validity it doesn't follow that the content of the document cannot feature in its validity conditions. If the Supreme Court's interpretation is correct then it is difficult to imagine any scenario in which a signed document would *not* satisfy section 9(b).<sup>27</sup> More generally, it would have been preferable if the Supreme Court had explained and justified its interpretative approach; and also engaged, in detail, with the Court of Appeal's reasoning (and explained why it considered it to be incorrect).

## 5.2 Can a Pickwickian Will be rectified?

The Supreme Court also disagreed with the Court of Appeal's conclusion that the phrase “a will” in section 20 AJA 1982 only covers Wills that are valid under section 9 WA 1837. Black L.J. had noted that the word “will” means ‘valid Will’ in some provisions of WA 1837; but in others — including section 9 — it refers to what she called “would-be wills”.<sup>28</sup> Whilst section 20 AJA 1982 and section 9 WA 1837 were enacted together (and so are “plainly intended to operate alongside” one another), Black L.J. held that the contextual features of section 9 that indicate that it covers all ‘would-be Wills’ are absent from section 20.<sup>29</sup> Furthermore, Black L.J. reasoned, the fact that the

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<sup>26</sup> The relationship between linguistic meaning and legal meaning is an important topic but I cannot address it here. See e.g. Jones, O. (2013) *Bennion on Statutory Interpretation*, 6th Edn., Butterworths, §§150-191.

<sup>27</sup> Lord Hodge, in an extra-judicial speech — “The Rectification of Wills: *Marley v Rawlings*” (12 February 2015) — said that “I am sceptical about commentators who seek to take the decision to extreme logical conclusions and suggest that the court may face claims for rectification where someone has signed a guarantee, shopping list or a gas bill thinking that it is his will.” But he gives no reason why court decisions should not be followed to their logical conclusions (how else are we to follow them?); and one might think that the fact that conclusions may be “extreme” warrants revisiting the decision that leads, logically, to them.

<sup>28</sup> *Marley v Rawlings* [2012] EWCA Civ 61, [41]. Black L.J. did not make the linguistic point that the most natural meaning of “Will” would limit its scope to valid Wills; she preferred to focus on contextual factors.

<sup>29</sup> *Ibid.* Lady Justice Black said that: “True it is that there are in the Wills Act certain provisions in which the word “will” means no more than “would-be will” — section 9 is one such and section 7...is another— but the restricted meaning in each case is clear from the context. Elsewhere, the word “will” is used to signify a valid will and that seems to me the sensible interpretation of it in section 20 also.” (*Ibid.*).

limitation period for section 20 rectification claims starts from the date of the Grant of Representation (i.e. probate) supports this narrower interpretation.<sup>30</sup> For the court has power to grant probate only if a Will is valid; and Black L.J. (rightly) asserted that it would be “odd” if a claim for rectification of a Pickwickian Will could be made without limitation of time.<sup>31</sup>

Black L.J. also emphasised the difference in function of the two provisions. Section 20 AJA 1982 is directed at the Will’s substance whereas section 9 WA 1837 concerns only its form; and, as “issues of substance naturally come after issues of form have been resolved” she found it:

“...very difficult to conceive of a set of circumstances in which rectification ordered under section 20 could enable an otherwise invalid would-be will to satisfy the requirements of section 9 without rocking the very foundations of that section...”<sup>32</sup>

In the Supreme Court, Lord Neuberger argued that, whilst there was force in Black L.J.’s approach as a matter of “academic linguistic logic”, it was wrong for five reasons.<sup>33</sup> First:

“...[it] takes away much of the beneficial value of section 20. If it could not be invoked to rectify a document which was currently formally invalid into a formally valid will, that would cut down its operation for no apparently sensible reason.”<sup>34</sup>

Leaving aside the rhetorical force of the phrases “takes away” and “cut down” (which are, of course, question-begging) this reasoning here is clearly consequentialist. The Supreme Court asserts

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<sup>30</sup> *Ibid.*, [42]; see section 20(2) AJA 1982. Black L.J. described this support as “possibly weak” — as the language of section 20 does not indicate that a Grant of Representation is a formal “pre-requisite to an application for rectification”; but, as it is a pre-requisite in practice, this does little to lessen its force (*Ibid.*).

<sup>31</sup> *Ibid.* This is reinforced by the fact that the time limit is short: only 6 months unless extended by the court.

<sup>32</sup> *Ibid.*, [43].

<sup>33</sup> *Ibid.*, [61].

<sup>34</sup> *Ibid.*, [62].

that it is more beneficial for the statutory power to apply to all would-be Wills (whether formally valid or not); and therefore that the (seemingly arbitrary) exclusion of Pickwickian Wills from the scope of the power requires justification (and, the Court asserts, there is no such justification).

The Supreme Court did not identify which principle(s) of statutory interpretation authorise this appeal to consequences. But it is relatively uncontroversial that a court is empowered (and, indeed, required) to have regard to the “likely consequences of adopting” opposing constructions of legal language in choosing between them.<sup>35</sup> Where one of the opposing constructions would lead to “beneficent” consequences (and/or the other would lead to “adverse” consequences) then that is a factor in favour of (or “telling against”) that construction.<sup>36</sup>

To the extent that adopting the interpretation with the more beneficial consequences requires departing from the more natural reading of the text, courts are (rightly) careful to assess whether the legislator should be taken to have foreseen and accepted the less beneficial consequences that would follow from adopting the more natural reading.<sup>37</sup> Lord Neuberger did not say whether he took one of the two opposing constructions to be more natural than the other;<sup>38</sup> but it is strongly arguable that the reading of section 20 AJA 1982 that limits “a will” to valid Wills is more natural one.<sup>39</sup> If that is right, the Supreme Court should have analysed the context of enactment of section 20 AJA 1982 to determine whether Parliament foresaw this issue arising and ought therefore to be taken to have, for example, compromised any adverse consequences flowing from the more natural reading against

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<sup>35</sup> See Jones, O. (2013) *Bennion on Statutory Interpretation*, 6th Edn., Butterworths, § 286.

<sup>36</sup> *Ibid.* This principle is sometimes called the ‘golden’ rule; but the formulation and scope of the golden rule is contested and clarifying it is beyond the scope of this article (see further Duxbury (2013), CUP, 155-169.

<sup>37</sup> See, for example, *Stock v Frank Jones (Tipton) Ltd.* [1978] 1 W.L.R. 231 *per* Lord Simon at 237: “...a court would only be justified in departing from the plain words of the statute were it satisfied that: ... (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly, could not have been prepared to accept it in the interest of a supervening legislative objective;...”.

<sup>38</sup> Lord Neuberger’s fourth reason is a linguistic one but, as I’d argue below, the reasoning is flawed.

<sup>39</sup> We may, perhaps, infer from Lord Neuberger’s recognition of the force of Black L.J.’s “linguistic logic” that he agreed that her interpretation of “will” (as excluding Pickwickian Wills) is the more natural reading.

other (conflicting) values.<sup>40</sup> It is easy to imagine policy reasons that might justify this choice; indeed, Black L.J. articulated one such rationale (based on the distinct purpose of imposing formal requirements) and the Supreme Court gave no reason to why this rationale was not “sensible”.<sup>41</sup>

Secondly, the Supreme Court appealed to purposive interpretation:

“...it [is] equally logical, but plainly more consistent with the evident purpose of the amendments made to the law of wills by sections 17 (which contains the new section 9) and 21 of the 1982 Act to deal with the validity and rectification issues together, at least in a case such as this, where the two issues are so closely related.”<sup>42</sup>

This reasoning is more puzzling. Even if it is right that one purpose of AJA 1982 was to deal with the validity and rectification together (and it is not ‘plain’ to me that it is) this says nothing about *how* they should be dealt with. The Court of Appeal’s approach — that only a formally valid Will may be rectified — seems as much a ‘taking together’ of these two issues/provisions as the Supreme Court’s position. Indeed, Black L.J. found that “section 20 is plainly intended to operate alongside the Wills Act” in reaching the *opposite* conclusion to that of the Supreme Court.<sup>43</sup>

The Supreme Court’s third reason was that:

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<sup>40</sup> *Marley* is one of three reported cases involving a couple who mistakenly signed each other’s Wills — the others are *Re Hunt* (1875) LR 3 P&D 250 and *Re Meyer* [1908] P 353 — so it is not impossible that Parliament contemplated this type of scenario. (In both these other cases the ‘Wills’ were held to be invalid.)

<sup>41</sup> *Marley v Rawlings* [2014] UKSC 2, [62].

<sup>42</sup> *Ibid.*, [63]. The references to “logic” seem misplaced. Perhaps Lord Neuberger was suggesting that, whilst Black L.J.’s approach has an attractive structure to it, that does not necessarily make it correct?

<sup>43</sup> *Marley v Rawlings* [2012] EWCA Civ 61, [41].

“...a document which subsequently turns out to be invalid as a will can be, and no doubt frequently is, admitted to probate. Thus...there is no objection to treating a document which purports to be a will as a will, even though it may subsequently turn out to be invalid.”<sup>44</sup>

It is unclear which principle of interpretation, if any, the Supreme Court appealed to here. Furthermore, this is a *non sequitur*: it does not follow from the fact that courts sometimes mistakenly treat a document as a formally valid Will that there is no objection to doing so. On the contrary, there is a strong objection: such a document is not a Will and ought not to be treated as one (and the relevant court erred — albeit, perhaps, faultlessly — in holding otherwise).

Fourthly, the Supreme Court furnished a linguistic argument:

“...while it would be wrong to express this as an exclusive definition (although it may be), it appears to me that the reference to a will in section 20 means any document which is on its face *bona fide* intended to be a will, and is not to be limited to a will which complies with the formalities. Indeed, the opening words of section 9 itself seem to use the word "will" to include a purported will which does not comply with the requirements of section 9(a) to (d). It provides that "no will" shall be valid unless it so complies, which clearly carries with it the irresistible implication that a document that does not so comply is none the less a "will" for the purposes of the section, but not a valid will.”<sup>45</sup>

It is interesting that it is only at this stage — *after* considering consequences and purposes—that Lord Neuberger engages with the *wording* of section 20.<sup>46</sup> However, the reasoning is flawed.

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<sup>44</sup> *Marley v Rawlings* [2014] UKSC 2, [64].

<sup>45</sup> *Ibid.*, [65]. It is unclear why the Supreme Court thought that it would be “wrong” to articulate a definition of “will” here. This is, after all, part of the *ratio decidendi* of the case — and, whilst the court might not be under a duty to make explicit the rule that it has relied on, it is surely not prohibited from doing so.

<sup>46</sup> In drawing an inference from the language of the section, Lord Neuberger appears to be engaging in his own “linguistic logic” here (whether or not “academic”).

First, the justification that the Supreme Court offers — that the word “will”, as used in section 9 WA 1837, includes a Pickwickian Will— is insufficient to establish its conclusion about section 20 AJA 1982. That requires the additional (implicit) premise that the word “will” should be given the same meaning in both statutory provisions;<sup>47</sup> but it is precisely this premise that the Court of Appeal rejected. The Supreme Court, surprisingly, failed to address (or even mention) Black L.J.’s reasons for rejecting this premise; which were linguistic — the phrase “No will shall be valid unless” contemplates invalid wills and is sufficient to override the ordinary presumption that “will” is used in its primary sense (i.e. restricted to valid Wills only) — and contextual (i.e. the ‘time limit’ point).

Lord Neuberger’s fifth and final criticism of Black L.J.s reasoning was that:

“...in another area of the law where formalities are required for validity, land contracts, rectification was permitted even where it had had the effect of converting an ineffective (albeit not an invalid) contract into an enforceable contract: see *Domb v Isoz* [1980] Ch 548, 559A-C...(That case was concerned with section 40 of the Law of Property Act 1925, ... which, in subsection (4) specifically envisages a contract which does not comply with subsection (1) being rectified so that it does.)”<sup>48</sup>

The Supreme Court here engaged in analogical reasoning to support its interpretation. However, even on the basis of its rather sketchy outline of the analogy that it seeks to draw, there are clearly key points of disanalogy. For not only does the source case concern ‘effectiveness’ rather than ‘validity’ but, as the Supreme Court acknowledged, the relevant statutory provision expressly allows for rectification of a non-compliant contract. So it is difficult to see how this argument provides any significant support for the court’s interpretation of section 20 AJA 1982.

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<sup>47</sup> This may be what Lord Neuberger was driving at with his second reason — but this is far from clear.

<sup>48</sup> *Marley v Rawlings* [2014] UKSC 2, [67].



In summary, the Supreme Court reached its conclusion on this point by appealing to a wide range of interpretative methodologies, including consequentialist reasoning; purposive construction; linguistic considerations; and analogical reasoning.<sup>49</sup> But it did not state (or even hint at) the relative weights that it assigned to these different interpretative methods.<sup>50</sup> Of these five reasons for differing from the Court of Appeal only the first (the argument from beneficial consequences) has significant force; and, as the principle of consequential construction is well established, it is not clear why the Supreme Court adopted this blunderbuss approach. An investigation of the context of enactment of AJA 1982 would assist us in evaluating whether the Supreme Court’s application of the consequentialist principle in this case was justified.

### 5.3 Was the Will “so expressed” that it failed in consequence of a “clerical error”?

The High Court answered this question in the negative. A court may only order rectification:

“If...a will is **so expressed** that it fails to carry out the testator's intentions, in consequence — (a) of a **clerical error**...”<sup>51</sup>

Proudman J. held that, although “clerical error” should be given a wide meaning, the phrase “so expressed...” restricted the court to the rectifying drafting errors — and excluded cases where the

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<sup>49</sup> The Supreme Court also held that, even if it were wrong on this point, it could “see no reason why” the word “will” in section 20(1) could not include a putative Will which is (retrospectively) validated by rectification: *Ibid.*, at [66]. However, it gave no argument in support of this (rather surprising) claim.

<sup>50</sup> This may be because, in its view, the methods all pulled the same way. But, even if this is true, the court could (and arguably should) have indicated which of these methods were more influential and which less so.

<sup>51</sup> Section 20(1) AJA 1982 (**emphasis added**).

document was correctly “expressed” but was simply signed by the wrong person.<sup>52</sup> The Court of Appeal declined to express a view on this point.<sup>53</sup>

The Supreme Court reached the opposite conclusion to that of Proudman J. but, in doing so, entirely missed her point. For Lord Neuberger focussed exclusively on the meaning of the word “clerical” — reasoning that it should be given a wide meaning — and ignored that fact that Proudman J. had based her conclusion solely on the interpretation of the phrase “so expressed”. The Supreme Court simply asked itself the wrong question:

**“The appellant's contention on rectification: is it a clerical error?”**

68 The final issue...is whether it is within the ambit of section 20(1). [Mr. Marley] argued that it is within para (a), "a clerical error". There is no doubt that there was an error. The question is whether it can be said to be "clerical". Proudman J. concluded that it could not, and the Court of Appeal did not determine the point.”<sup>54</sup>

It should be noted that Proudman J. emphatically did *not* conclude that the solicitor’s error was not “clerical”. On the contrary, she held that “clerical error bears a wide meaning”.<sup>55</sup> Lord Neuberger then considered various arguments on the scope of the word “clerical” before concluding that:

“...the term "clerical error" can, as a matter of ordinary language, quite properly encompass the error involved in this case. There was an error, and it can be fairly characterised as clerical, because it arose in connection with office work of a routine nature. Accordingly,

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<sup>52</sup> *Marley v Rawlings* [2011] EWHC 161 (Ch), [29].

<sup>53</sup> *Marley v Rawlings* [2012] EWCA Civ 61, [94] *per* Black L.J. In his concurring opinion, Sir John Thomas also reserved his position on it — but went on to observe that “there are powerful arguments for the section to be given a wide and generous scope.” (*Ibid.*, [108]).

<sup>54</sup> *Marley v Rawlings* [2014] UKSC 2, [68].

<sup>55</sup> *Marley v Rawlings* [2011] EWHC 161 (Ch.), [29].

given that the present type of case can, as a matter of ordinary language, be said to involve a clerical error, it seems to me to follow that it is susceptible to rectification.”<sup>56</sup>

On this point, the Supreme Court was more explicit in its interpretative methodology. Lord Neuberger addressed the ordinary meaning of “clerical” and concluded that it did not have “a precise or well-established meaning” and was capable of bearing the wide or the narrow meaning advocated by the parties. He resolved this ambiguity (in favour of the wide meaning) by reference to a combination of coherentist, purposive, consequential and considerations; though, again, he does not indicate what weight he attributes to these different factors.<sup>57</sup> However, only the consequentialist argument provides significant support for the court’s conclusion.

First, the Supreme Court’s coherence-based reasoning is flawed. Lord Neuberger noted that the (common law) power to rectify of other types of document has no “clerical error” restriction and, as “there is no apparent reason for a different rule for wills”, this favours a very wide interpretation of section 20.<sup>58</sup> But this ignores both the fact that, historically, Wills were excluded from the common law power; and that the grounds for rectification under AJA 1982, which “introduces rectification for the first time for wills”, clearly differ from the grounds at common law.<sup>59</sup> So the reason for treating Wills differently is simply that Parliament has so ordained.<sup>60</sup>

Secondly, its purposive argument is a *non-sequitur*. Lord Neuberger asserted that the purpose of the relevant part of AJA 1982 is to make “the law on wills more flexible” and to render it “easier to validate or “save” a will than previously” — this, he argues, favours “a broad

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<sup>56</sup> *Marley v Rawlings* [2014] UKSC 2, [82].

<sup>57</sup> *Ibid.*, [77]—[78], [79] & [80]—[81] respectively.

<sup>58</sup> *Ibid.*, [77]. For Lord Neuberger, this justified the proposition that: “the grounds for rectification is [sic] as wide for wills as the words of section 20(1) can properly allow.”

<sup>59</sup> *Ibid.*, [79]. Lord Neuberger would “have been minded” to extend the common law power to Wills; but he considered it “unnecessary” to address the point — as “Parliament has legislated on the topic” (*Ibid.*, [28]).

<sup>60</sup> Whether Parliament had good reason for doing so is a different question; the Supreme Court didn’t address what that reason might be — perhaps because it is not part of its role to evaluate Parliament’s policy choices.

interpretation” of section 20.<sup>61</sup> However, as it was not possible to rectify a Will prior to AJA 1982, this purpose is satisfied no matter how broadly (or, more to the point, how narrowly) we interpret section 20. The real question is: *how* easy did Parliament intend to make it to save a Will? And, in answering that question, we must recognise that Parliament imposed explicit limits on this power — including the “clerical error” limitation. Parliament must be taken to have had a purpose in enacting this restriction; but the Supreme Court undertook scant investigation of its purpose.<sup>62</sup> So it simply doesn’t follow from this purposive argument that a broad interpretation of section 20 is warranted.<sup>63</sup>

The Supreme Court’s consequentialist argument was stronger.<sup>64</sup> Lord Neuberger noted that the same factual outcome (i.e. that Alfred Rawlings signed a document that was expressed to be his wife’s Will) could’ve arisen instead through a ‘copy and paste’ error; this would clearly have been “clerical” and therefore capable of rectification — allowing Mr. Marley to inherit the estate. There did not seem to be anything in the nature of the actual mistake (i.e. Alfred signing the wrong document) to justify the opposite result — that the two estranged sons should inherit the estate contrary to Alfred’s (and Maureen’s) wishes. Lord Neuberger concluded that:

“While I accept that fine distinctions can often lead to different outcomes where one is near the limits of the scope of some statutory provisions, a distinction of this sort seems to me to be capricious or arbitrary. The position is essentially the same in the two cases.”<sup>65</sup>

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<sup>61</sup> *Ibid.*, [79].

<sup>62</sup> The Supreme Court briefly referred to the Law Reform Committee Report “Interpretation of Wills” Cmnd. 5301 (1973) — the progenitor of the AJA 1982 — but dismissed it because it “does not help” *Ibid.*, [84].

<sup>63</sup> Cf. Sir John Thomas: “Parliament made very limited changes to the law in 1982 and it would not be right for a court to go beyond what Parliament then decided.” *Marley v Rawlings* [2012] EWCA Civ 61, [109].

<sup>64</sup> Lord Neuberger presented this as a coherence-based argument: “the law would be somewhat incoherent if subtle distinctions led to very different results in cases where the ultimate nature of the mistake is the same” but it is the (seemingly arbitrary) difference in consequences that motivates the argument (*Ibid.*, [80]).

<sup>65</sup> *Ibid.*, [81]

This reasoning is also best viewed as an application of the consequentialist principle of legal interpretation. Lord Neuberger had found the word “clerical” to be ambiguous; and here he asserts that the fact that adopting the wider meaning would generate better outcomes is a reason for favouring that wider meaning.<sup>66</sup> And there is authority that the consequentialist principle may, in suitable cases, be used to obviate results that are “capricious or arbitrary”.<sup>67</sup> But, again, the Supreme Court failed to investigate the context of enactment of AJA 1982 to determine whether Parliament should be taken to have foreseen and accepted this ‘arbitrary’ difference in consequences. The key point, however, is that Proudman J.’s conclusion on this issue was based on her interpretation of the phrase “so expressed” in section 20(1) AJA 1982 — and not on the meaning of the word “clerical”.

#### 5.4 Conclusion on Statutory Interpretation

The Supreme Court failed to make a persuasive case for its interpretations of the relevant Acts; and was less than transparent about the method that it adopted in arriving at its conclusions. Methodologically, it appealed to several interpretative approaches (and criticised others — particularly Black L.J.’s “academic linguistic logic”) without always being clear about what it was doing — and without giving any indication of the relative weights that it attached to these different methods. Substantively, several aspects of the Supreme Court’s arguments are open to criticism; and those that have force rely primarily on appeals to consequences. The decision may be rationalised as

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<sup>66</sup> There is some suggestion in the literature that the ‘golden rule’ is — or, at least, was, limited to judicial departures from the (primary) ordinary meaning of the legal language and did not cover the resolution of ambiguities (see, for example, Fifoot, C.H.S. (1959) *Judge and Jurist in the Reign of Queen Victoria*, (London: Stevens and Sons), 130. But this is contradicted by authority — see, for example, *R. v Judge of the City of London Court* [1892] 1 QB 273, *per* Lord Esher M.R. at 290. In any event, if an appeal to consequences may justify the court departing from the ordinary meaning of legal language then *a fortiori* such an appeal is legitimate in resolving an ambiguity in that language; and whether the latter is then also called an application of the ‘golden rule’ is an issue of terminology only.

<sup>67</sup> In *Luke v. I.R.C.* [1963] AC 557 Lord Reid departed from the ordinary meaning of a tax statute to obviate a result “so absurd and **capricious** that even the Inland Revenue shy at enforcing it.”; and in *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20 Lord Scott held that there is an “interpretative presumption that Parliament does not intend that legislation should bring about results that are unreasonable or unfair or **arbitrary**.” (**emphases added**).

an application of the consequentialist principle of legal interpretation: the Supreme Court adopted an (available) reading of section 20 which, in its view, maximised its beneficial (and minimised its adverse) consequences of the opposing constructions. If that is right then, to evaluate the Supreme Court's conclusions, we would need to see an examination of the context of enactment of AJA 1982.

## **6. Interpretation of the 'Will'**

Mr. Marley introduced a new argument at the Supreme Court stage: that the document signed by Alfred Rawlings could be recognised as an effective Will through a process of interpreting it.<sup>68</sup> This new argument was an alternative to Mr. Marley's principal argument that the court should use its statutory power to rectify the document. As the Supreme Court's interpretation of the statutory power of rectification sufficed to dispose of the appeal, and argument on this "difficult" new point had been limited, and it declined to express a concluded view on it.<sup>69</sup> However, as the new argument "raises a point of some potential importance", the Supreme Court made some remarks on the proper approach to interpreting Wills and other non-legislative legal documents.<sup>70</sup>

### **6.1 The general approach to interpreting legal documents**

Lord Neuberger first set out the general approach to interpreting contracts:

"When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words,

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<sup>68</sup> That is, either by applying the common law *simpliciter* or as supplemented by section 21 AJA 1982 — which, in specified circumstances (for example, ambiguity), allows "extrinsic evidence, including evidence of the testator's intention" to be admitted "to assist in its interpretation".

<sup>69</sup> *Marley v Rawlings* [2014] UKSC 2, [41].

<sup>70</sup> *Ibid.*, [36].

(a) in the light of

- (i) the natural and ordinary meaning of those words,
- (ii) the overall purpose of the document,
- (iii) any other provisions of the document,
- (iv) the facts known or assumed by the parties at the time that the document was executed, and
- (v) common sense, but

(b) ignoring subjective evidence of any party's intentions. ...”<sup>71</sup>

Lord Neuberger then asserted that the same approach should apply to the interpretation of Wills:<sup>72</sup>

“When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context.”<sup>73</sup>

The Supreme Court’s claim here is correct but potentially misleading. It sets out the approach to interpreting documents at a very high level of generality: invoking the ‘Holy Trinity’ of intention, language and context. At this level of generality, the approach is wholly uncontroversial — and almost equally unhelpful. It might, perhaps, serve as a corrective to the traditional view that there

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<sup>71</sup> *Ibid.*, [19] (my tabulation).

<sup>72</sup> In addition to Wills, the Supreme Court asserted that this approach also applies to “unilateral notices” (at [21], [25]) and “patents” (at [22], [25]). It is unclear whether the Supreme Court would consider that the same interpretative approach also applies, *mutatis mutandis*, to legislative documents (such as statutes).

<sup>73</sup> *Ibid.*, [20]. I am grateful to an anonymous reviewer for pointing out that the Supreme Court, in *Trump International Golf Club Scotland Ltd. v Scottish Ministers* [2015] UKSC 74, states that there “is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document” (para. 33, *per* Lord Hodge). That may be so. However, Lord Hodge then goes on to say how the particular kind of document at issue in the case (e.g. that it is a public document; and that breach of its terms may result in criminal liability) influenced the court’s approach to interpreting it. So this is, perhaps, another example of the potentially misleading nature of the court’s initial emphasis on uniformity of interpretative approach.

are distinctive sets of interpretative rules for each different type of legal instrument (with little appreciation of the underlying commonalities in approach). But it tells us nothing about how we should actually go about “interpreting the words used” or identifying the document’s “overall purpose”; or which features of the “documentary, factual and commercial context” of a instrument are salient; or, crucially, how these factors interact in the event that they conflict with one another (a frequent feature of appellate cases).

Furthermore, in its strong focus on similarity of approach, it de-emphasises the crucial differences between types of legal document which often lead us to approach them differently. There is, of course, a level of descriptive generality at which the interpretative approach to all documents is the same — one reads the language, in context, and seeks to understand it. This applies equally to a Will or a statute as it does to a poem, a biography, or a set of instructions for assembling a wardrobe. But this masks the significant differences between types of document which, at a less abstract (but more useful) level, justify adopting different interpretative approaches. Lord Neuberger anticipated (and attempted to address) this latter objection:

“Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned.”<sup>74</sup>

Again, this is correct but potentially misleading. It is true that the fact that a Will is a unilateral document is merely one contextual feature relevant to its interpretation. But this feature is a necessary condition of a instrument being a Will — if a legal instrument is not unilateral then it is not a Will. If certain inherent features of a type of legal instrument (such as whether it is unilateral

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<sup>74</sup> *Ibid.*, [21].



or bi-/multi-lateral) invariably lead us to approach that type of instrument differently than other types then it is more useful to acknowledge that there are *different* interpretative approaches to different types of legal instrument. Just as the fact that a poem is a work of art created to inspire its reader, provoke reflection on the human condition and/or illustrate the beauty of language — whereas assembly instructions are intended to enable the reader efficiently to produce a wardrobe from its component parts — makes it more useful to recognise that these types of document should be read *differently*.

This is not to deny that, at a very general level of description, the interpretative process is the same for all types of language use. But the court cannot linger at that abstract level for long: it is called upon to apply that process to a particular legal instrument (in a context of a particular set of facts) and this requires it to engage with the particular characteristics of that type of instrument. The court's emphasis on uniformity of interpretative approach is unhelpful to the extent that it diverts attention away from the particular characteristics of the relevant type of legal instrument that justify differences of approach when addressing the crucial points of detail.

The particular characteristics of Wills that should inform the approach that the courts take to their interpretation are explored in Part 6.3 below. But first I address the Supreme Court's criticisms of Lord Hoffmann's influential articulation of the principles of contractual interpretation and its impact on the scope of (common law) rectification.

## **6.2 Criticisms of the general approach: interpretation v. rectification**

Lord Neuberger approved the propositions that were common ground: (1) that the two 'Wills' may be read together; and (2) that, so read, "it is clear what happened and what was intended by Mr Rawlings".<sup>75</sup> The estranged sons' argument was simply that Alfred Rawlings' intentions could only be given effect through rectification i.e. that doing so would be outside the scope of interpretation.

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<sup>75</sup> *Ibid.*, [35].

The Supreme Court then referred to the debate over the merits of Lord Hoffmann's articulation of the proper approach to contractual interpretation in the *ICS* case:

"36 ...In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912H-913E, Lord Hoffmann set out the principles which the court should apply when interpreting documents in five propositions. Most of the content of that passage is unexceptionable...

37 However, the second sentence of Lord Hoffmann's fifth proposition in *Investors Compensation* is controversial. That sentence reads, so far as relevant,

"...if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had".

38 Lord Hoffmann took that approach a little further in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, paras 21-25. Having observed that the exercise of interpretation involves "decid[ing] what a reasonable person would have understood the parties to have meant by using the language which they did" and referring to the "correction of mistakes by construction", he said this:

"[T]here is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a

reasonable person would have understood the parties to have meant.”<sup>76</sup>

Pausing here, Lord Hoffmann’s approach would appear to permit (require?) the court to uphold Alfred Rawlings’ Will simply through a process of interpretation — at least, if the signing mistake counts as something having “gone wrong with the language”. However, Lord Neuberger went on to rehearse some criticisms of the apparent extension, in *Chartbrook*, of the fifth *ICS* proposition:

“39 In a forcefully expressed article, "Construction and Rectification after *Chartbrook*" ... Sir Richard Buxton has suggested that Lord Hoffmann's approach to interpretation in these two cases is inconsistent with previously established principles. Lewison on *The Interpretation of Contracts* ...suggests that Sir Richard has made out "a powerful case for the conclusion that the difference between construction and rectification has reduced almost to vanishing point", if Lord Hoffmann's analysis is correct.”<sup>77</sup>

David McLauchlan has suggested that, here, Lord Neuberger “clearly cast doubt on the validity of” Lord Hoffmann’s approach — and that Lord Neuberger confirmed this in an extra-judicial speech:<sup>78</sup>

“In [*Marley*], the Supreme Court has suggested that [*Chartbrook*] may go too far, not least because, as Sir Richard Buxton put it in a trenchant article, it reduces the “difference between construction and rectification almost to vanishing point”.”<sup>79</sup>

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<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> McLachlan, D. "The Lingering Confusion and Uncertainty in the Law of Contract Interpretation" (2015) L.M.C.L.Q. 406-438, 413.

<sup>79</sup> Neuberger, D. (2014) “The impact of pre- and post-contractual conduct on contractual interpretation”, a speech delivered on 11 August 2014, para. 23 (available at [www.supremecourt.uk/news/speeches.html](http://www.supremecourt.uk/news/speeches.html)).

Several points on this. First, Lord Neuberger goes further here than he did in *Marley*; suggesting that this view was not unanimously endorsed by the other justices in *Marley*.<sup>80</sup> Secondly, it applies only to the *Chartbrook* ‘unlimited red ink’ extension of the fifth *ICS* proposition — not to that proposition itself. Thirdly, subsequent courts have (so far) understood *Marley* differently: at least three reported first-instance decisions have referred to *Marley* in making substantial ‘corrections’ to Wills by interpretation (without requiring rectification).<sup>81</sup> Fourthly, even it is right that *Chartbrook* leads to construction and rectification effectively merging into one, it is not clear that this entails that *Chartbrook* must be rejected. For the existence of two separate causes of action is surely not an end in itself; rather, we must identify what value is being served by the existence of a distinct action for rectification? Lord Neuberger also anticipated (and attempted to address) this question:

“At first sight, it might seem to be a rather dry question whether a particular approach is one of interpretation or rectification. However, it is by no means simply an academic issue of categorisation. If it is a question of interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (e.g. if there had been delay, change of position, or third party reliance).”<sup>82</sup>

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<sup>80</sup> Robert Ham QC (leading Counsel for Mr. Marley) has noted that “During the course of argument at least two of the justices seemed strongly attracted by the construction argument” Ham, R. (2014) “Thy Will Be Done”, *Trusts & Trustees*, Vol. 20, No. 9, 966—970, 967. Presumably Lord Neuberger wasn’t one of the “at least two” justices — Lords Carnwath and Clarke seem to be the most likely candidates.

<sup>81</sup> *Re Huntley (Deceased)*; *Brooke v. Purton* [2014] EWHC 547 (Ch.); *Burnard v. Burnard* [2014] EWHC 340 (Ch.); and *Reading v. Reading* [2015] EWHC 946 (Ch.). In each these cases the 6-month time limit for claiming rectification had expired — highlighting the significance of Black L.J.’s interpretative argument.

<sup>82</sup> *Marley v Rawlings* [2014] UKSC 2, [40].

The first suggested difference, however, is not a difference at all — as the ‘corrective’ interpretations contemplated by Lord Hoffmann may also result in a document which has “a different meaning from that which it appears to have on its face”. The second — that rectification is discretionary — is a difference more in theory than in practice; for, in reality, it is within the gift of the court whether to adopt a particular ‘corrective’ interpretation or not. The third difference — that the court can grant rectification (but not interpretation) on terms — has more force. However, each three of the justifying circumstances offered by the courts (delay, change of position, or third party reliance) is concerned with protecting the reasonable expectations of third parties. It is these expectations that are sought to be protected by limiting the scope of legal interpretation.

But it is not the *Chartbrook* ‘unlimited red ink’ principle that jeopardises third party expectations. That would entail that the greater the change needed to correct a document then the greater the risk of prejudicing third party interests; but that’s not necessarily true — and *Marley* is a case in point. For much red ink is required before the document signed by Alfred Rawlings would read as his Will — and yet, as the Supreme Court held that “it is clear, even on a cursory reading of the Will, that something has gone seriously wrong”, it is difficult to imagine that any third party could’ve reasonably relied on it as it stood.<sup>83</sup> But removing (say) a zero that was mistakenly added to a contract price is just about the most minimal change imaginable, red-ink-wise, and yet could have catastrophic consequences for a third party who had purchased the benefit of receiving that sum.

The aspect of Lord Hoffmann’s approach that has the potential to put legitimate third party expectations at risk is, I’d argue, the width of second *ICS* proposition:

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<sup>83</sup> *Ibid.*, [57]. Additionally, as I argue in FN 83, there can be virtually no such reasonable reliance for Wills.

“The background...includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”.<sup>84</sup>

Whilst it is clearly true that all aspects of the context of a person’s use of language are potentially relevant to understanding it, considerations of legal policy can (and do) place limits upon the admissibility of such context.<sup>85</sup> Lord Hoffmann is obviously right to limit it to that which was “reasonably available to the parties”; but, in cases involving third party interests, there is reason to further restrict it to that which is reasonably available to those third parties.<sup>86</sup> For the risk to third parties is that a legal document may be ‘corrected’ via resort to contextual features that they could not reasonably be expected to have been aware of; and this is true regardless of how minimal or radical the changes needed to correct the document may be. So legitimate third party interests may be protected — and the distinctive function of rectification preserved — by limiting the background information that’s admissible in the process of interpretation; and without needing an arbitrary restriction on the volume of red ink that courts may use in that process.<sup>87</sup>

### 6.3 Applying the general approach to Wills

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<sup>84</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912.

<sup>85</sup> Lord Hoffmann’s third proposition explicitly acknowledges two categories of exclusion: (1) evidence of the previous negotiations of the parties; and (2) any declarations of their subjective intent (*Ibid.*).

<sup>86</sup> *Ibid.* This is the position taken in the European Union’s Draft Common Frame of Reference (DCFR) — Principles, Definitions and Model Rules of European Private Law, II. – 8:101(2): “In a question with a person, not being a party to the contract ... who has reasonably and in good faith relied on the contract’s apparent meaning, regard may be had to the circumstances ... only to the extent that those circumstances were known to, or could reasonably be expected to have been known to, that person.”

<sup>87</sup> The potential drawback to this approach is that a single text may mean different things for different people — one thing to the parties to it but perhaps other things to third parties. But doesn’t that just reflect reality?

How does this apply to Wills? There are virtually no legitimate third-party reliance interests prior to the testator's death.<sup>88</sup> However, once the estate starts to be distributed the recipients of legacies may then have legitimate interests; so there is a case for legal protections such as a 'change of position' defence.<sup>89</sup> But a recipient of a legacy would already have such a defence against an action for repayment (restitution) brought by the executors — ordering rectification of the Will would only influence whether there was a 'mistake of law' to ground such a restitutionary claim. So it seems that the putative beneficiaries of the Will would only need protecting if they had changed their position *in anticipation of* receiving a legacy (which they do not then receive — due to a timely 'corrective' interpretation). This does, no doubt, happen in some cases; but the moral claim to legal protection here is much weaker.<sup>90</sup> So this may justify taking a different approach to the interpretation of Wills; and a lesser (or, perhaps, no) role for rectification.<sup>91</sup>

How would this apply to the document signed by Alfred Rawlings? Mr. Marley was the third party to whom the document purportedly granted an interest. As "it is clear, even on a cursory reading of the Will, that something has gone seriously wrong", he was on notice that it may not be wise to rely on that 'interest'.<sup>92</sup> However, it was Mr. Marley who was seeking the corrective interpretation. The third parties whose interests would have been prejudiced by the court adopting a 'corrective' interpretation were the two estranged sons. They would not have been aware that of their potential legal interest until the signing mistake was discovered; and they could reasonably be expected to be aware of the relevant features of the context (i.e. that Alfred intended his estate to go

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<sup>88</sup> Wills are not public documents until well after the testator's death— so often beneficiaries will not know of their future interests. Even if they do, it remains open to the testator to change their Will, or to expend the relevant assets, at any time ('death-bed' alterations are not uncommon). So a third party's interest could be legitimate only to the extent that: (1) they know the contents of the Will; (2) the testator (due to, say, mental incapacity) cannot now change the Will; and (3) the relevant assets cannot be expended. Even then, as the third party is a gratuitous beneficiary, it is questionable whether the law ought to protect their interest.

<sup>89</sup> If, for example, if a legatee has spent the money in good faith then it may be unjust to require repayment.

<sup>90</sup> Cf. a purchaser of the benefit of a contract who changes its position in anticipation of receiving the benefit.

<sup>91</sup> And other legal instruments, such as private trusts, which may share this feature.

<sup>92</sup> *Marley v Rawlings* [2014] UKSC 2, [57].

to Mr. Marley but had signed the wrong document) in evaluating whether or not to rely on that potential interest. So the argument that the law should protect their expectations by limiting the scope of ‘correction’ interpretation in this way is weak.

#### 6.4 Interpreting ‘interpretation’

A further question arises: does this corrective process still deserve the name ‘interpretation’? A detailed analysis of the concept of interpretation is beyond the scope of this article; I will therefore confine myself to five points. First, the level of focus on the meaning of the word ‘interpretation’ is arguably unwarranted. In exercising their adjudicative function, courts frequently undertake a process of engaging with laws to understand their meaning so as to apply them in resolving disputes. We typically use the concept-word ‘interpretation’ to label this phenomenon. But if, on further elucidation of that concept-word, it appears that it fails adequately to capture the target phenomenon then it is open to us to adopt a different concept-word that better captures it.<sup>93</sup>

Secondly, the meaning of ‘interpretation’ is contested.<sup>94</sup> Some seek to limit it to the retrieval or explanation the meaning of an object and, where the object is linguistic, this amounts to interpretation as paraphrasing — interpretation in the sense that we call translators ‘interpreters’.<sup>95</sup> This suggests that interpretation is what Twining & Miers called “a hunt for buried treasure”.<sup>96</sup> However, ‘interpretation’ is also used to refer to a partly (perhaps even primarily) creative process:

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<sup>93</sup> Contrast the situation where, say, the Constitution expressly requires courts to “interpret” the law — and the courts must therefore interpret “interpret” in order to comply with their constitutional obligation.

<sup>94</sup> See, for example, Sunstein, C. (2014) “There is Nothing that Interpretation Just Is”, [available at SSRN: http://ssrn.com/abstract=2489088](http://ssrn.com/abstract=2489088).

<sup>95</sup> For example, Ludwig Wittgenstein claimed that “...one should speak of interpretation only when one expression...is substituted for another.” Wittgenstein, L. (2009) [1953] “Philosophical Investigations”, 4th Edition (translated by G.E.M. Anscombe, P.M.S. Hacker and Joachim Schulte), § 201.

<sup>96</sup> “The word ‘interpretation’ has various shades of meaning: in respect of rules, ‘to interpret’ is generally used in the sense of ‘to clarify the scope of’ or ‘to attribute a meaning to’ a rule or part thereof. In some contexts it can be treated as being synonymous with such words as ‘elucidate’, ‘expound’, ‘explain’ or ‘construe’, all of which suggest that the subject-matter has an established or settled meaning which it is the role of the interpreter to search for, discover and bring to light, as in a hunt for buried treasure.” Twining, W. and Miers, D. *How to Do Things With Rules* (1st Edn., 1976) 83.



“...often the word ‘interpret’ is used to suggest a wider role for the interpreter, one that involves an element of elaboration or choice or even creation. ... Thus the buried treasure analogy is inappropriate in the context of Olivier’s interpretation of Hamlet... In such contexts it would seem odd to treat interpretation as solely a matter of explanation or discovery; the interpreter is working with material that offers a greater or lesser degree of scope for choice and intervention on his part. ... [in law] interpretation...ranges from simple search and discovery of a clear settled meaning, to activity that is nearer to relatively unfettered creation of something new.”<sup>97</sup>

The existence of this more creative aspect of the usage of ‘interpretation’ makes it difficult to argue that it cannot include the kind of corrective process envisaged by Lord Hoffmann.

Thirdly, and relatedly, in the realm of statutory interpretation — where the courts have no power to order rectification of the legislative language to correct a mistake — it has long been accepted that errors may be corrected through a process known as “rectifying construction”.<sup>98</sup> Indeed, in that context, the courts are familiar with the need to weigh legitimate third party interests as part of the interpretative process.<sup>99</sup>

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<sup>97</sup> *Ibid.*, 83-4. See also Endicott, T. (1994) “Putting Interpretation in Its Place”, *Law & Philosophy*, 13, No. 4, 451: “An interpretation is an answer to the question, “What do you make of this?” Interpretation is the process of coming up with an answer. Creativity and constraint complement each other in that process. If I ask, “What do you make of this?” I ask you to make something, but it must be something made *of this*.”.

<sup>98</sup> See, for example, Bennion, F. (1997) *Statutory Interpretation*, 3rd Edn., Butterworths, § 287 (p. 675ff). I note, but cannot now address, the contested relationship between ‘interpretation’ and ‘construction’: for more on this see *Ibid.*, § 1; and the work of Lawrence Solum (who strongly advocates a version of this distinction).

<sup>99</sup> “A flawed text has been promulgated as expressing the legislative intention. This needs judicial correction. Yet those who have relied on it are entitled to protection. This raises a difficult conflict between literal and purposive construction. The courts tread a wary middle ground between the extremes. The court must do the best it can to implement the legislative intention without being unfair to those who reasonable expect a predictable outcome.” *Ibid.*, p.676.

Fourthly, the very object of legal interpretation is contested. It is often assumed to be a legal text.<sup>100</sup> And, indeed, this approach seems to be implicit in the Supreme Court's approach in *Marley*.<sup>101</sup> However, others argue that the object of legal interpretation is the act of giving legal force to a item of language (such as a text) — the *doing* of something with that language (a 'language-act').<sup>102</sup> Statutes, for example, are, after all, not called 'Texts of Parliament' — they are called "Acts". This does not, of course, mean that the language is irrelevant to legal interpretation — on the contrary, it is crucially important.<sup>103</sup> But, it is argued, the language should (and, indeed, can only) be understood by reference to the context in which it was used; and it is often the case that, if text and context conflict, context often emerges as the victor.<sup>104</sup> As Lord Steyn has said: "In law, context is everything";<sup>105</sup> and "that is certain which the context renders certain".<sup>106</sup> Indeed, in *Marley*, Lord Neuberger appears to acknowledge that the objects of legal interpretation are "utterances" or "statements" (i.e. acts) not mere linguistic items — not mere sentences abstracted from the context

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<sup>100</sup> See, for example, Aharon Barak: "The object of interpretation is the text. The text is the *interpretandum*. This is true of constitution and statute, case law and custom, contract and will. Interpretive activity extracts or extricates the legal...norm from its semantic vessel. ...The norm extracted from the text is the product of interpretation. It is not the object of interpretation. The text is the object of interpretation." Barak, A. (2003) *Purposive Interpretation in Law*, Princeton University Press, 11-12.

<sup>101</sup> For example, in the Supreme Court's acceptance that "the two documents can be read together" *Marley v Rawlings* [2014] UKSC 2, [35]; and in its approval of Nicholls J.'s dicta in *In re Williams decd* [1985] 1 WLR 905, 911 that: "...if, however liberal may be the approach of the court, the meaning is one which the word or phrase cannot bear, I do not see how ... the court can declare that meaning to be the meaning of the word or phrase", and that "varying or contradicting the language used, would amount to re-writing", which is "to be achieved, if at all, under the rectification provisions in section 20" (*Ibid.*, [42]).

<sup>102</sup> See, for example, John Gardner: "...Legislation is a speech-act. As J.L. Austin says of speech-acts more generally, '[...]the total speech-act in the total speech-situation is the only actual phenomenon which, in the last resort, we are engaged in elucidating'. Austin, *How to Do Things with Words* (Oxford 1962), 148. So the ultimate object of interpretation is strictly speaking the act of legislating." Gardner, J. (2007) "Some Types of Law", in Edlin, D. (ed), *Common Law Theory* (Cambridge University Press 2007) 51-77, 53 [FN 9].

<sup>103</sup> As John Gardner proceeded to say: "My point is that the act of legislating is the act of enacting a text, meaning that the interpretation of the text has primacy in the interpretation of the legislation." (*Ibid.*).

<sup>104</sup> The voluminous case law on 'rectifying construction' is testament to this.

<sup>105</sup> Steyn, J. (2004) "Dynamic Interpretation Amidst an Orgy of Statutes" 35 *Ottawa Law Review* 163-177, 168. I should add that I have not taken this short quotation out of context.

<sup>106</sup> *Mannai Investments Co Ltd v Eagle Star Assurance Co Ltd*. [1997] AC 749, 767. Lord Hoffmann makes a forceful (and philosophically well-informed) defence of the *Mannai* decision, and his approach to correcting mistakes in legal documents by interpretation, in "The Intolerable Wrestle", 114 *S. African L.J.* 656 (1997).

in which they are used.<sup>107</sup> If this is correct then it becomes much easier to see how Alfred Rawlings' Will could be effective through a process of 'interpretation'; for we're no longer simply interpreting the documents that he and his wife signed — rather, we're interpreting the event (the language-acts) that they performed and which gave those documents legal 'life'.<sup>108</sup>

Fifth and finally, many argue that the objective of interpretation is to arrive at the intentions that we may justifiably ascribe to the 'author' (the person who performed the language-act); in the legal context, 'interpretation' is the ascriptions of intentions to the law-maker(s).<sup>109</sup> There is support for this view in the UK case law — including in *Marley* itself.<sup>110</sup> If this is right, then Alfred Rawlings' Will may well be effective as a matter of interpretation; for, as Black L.J. said:

"There can be no doubt as to what Mr and Mrs Rawlings wanted to achieve when they made their wills and that was that Mr Marley should have the entirety of their estate and their sons should have nothing. Unfortunately, that certain knowledge is not what determines the outcome of this appeal."<sup>111</sup>

If the objective of legal interpretation is to give effect to the author's communicative intentions — and we have "certain knowledge" of what Alfred Rawlings "wanted [i.e. intended] to achieve" — then it is difficult to see the objection to calling the process of correcting his Will 'interpretation'.

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<sup>107</sup> "As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005]... "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre." To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, that "[c]ourts will never construe words in a vacuum". *Marley v Rawlings* [2014] UKSC 2, [20].

<sup>108</sup> Indeed, this is the justification for the proposition that there was common ground between the parties in *Marley* — and accepted by the Supreme Court — that the two 'Wills' should be interpreted together. We do that because the two documents were executed as part of the same *event* (i.e. the same set of language-acts).

<sup>109</sup> See, for example, Marmor, A. (2005) *Interpretation and Legal Theory*, 2nd. Edn., Hart Publishing.

<sup>110</sup> *Marley v Rawlings* [2014] UKSC 2, [19]. See also, for example, the oft-quoted remark of Chief Justice Tindal in the *Sussex Peerage Case* (1844) 8 E.R. 1034, 1057: "... the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act."

<sup>111</sup> *Marley v Rawlings* [2012] EWCA Civ 61, [7].